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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. GREGORY COLBERT, Defendant and Appellant.	A118207 (Alameda County Super. Ct. No. C151628)

Gregory Colbert was convicted by a jury of first degree murder and sentenced to a term of 75 years to life in prison. He argues that: (1) he was denied his constitutional right to represent himself; (2) the trial court erroneously admitted evidence that he belonged to a gang and that he committed a rape two days before the murder; (3) he was denied effective assistance of counsel; and (4) that there was insufficient evidence of premeditation and deliberation to support the conviction. We find none of these arguments to be meritorious, and affirm the judgment.

BACKGROUND

Prosecution Case

Early in June 2004, defendant introduced Larry Johnson to Glen Phason. On the evening of June 7, 2004, Johnson joined defendant and Phason in front of defendant's grandmother's house on Halliday Street in Oakland, where defendant lived. They spent time on the front porch, "[j]ust chilling, socializing." At some point Johnson drove Phason to a store, where Phason bought a bottle of Hennessey cognac. They then returned to the porch and drank from the bottle.

Later that night Phason asked Johnson for a ride home. After the two men got into Johnson's car, defendant came down from the porch and went with them. When they arrived at Phason's destination, Johnson remained in the car while defendant and Phason got out of the car and walked away.

After a minute or two, Johnson heard two gunshots. He looked up and saw defendant tuck a shotgun under his coat. Johnson had not seen the shotgun before, and defendant was picking up shotgun shells from the ground. Defendant and Phason had not been arguing that evening, and Johnson had not heard or seen anything that made him think defendant was going to kill Phason. Defendant got back in the car and told Johnson to drive back to the Halliday Street house. When they arrived, Johnson testified, defendant said: "Don't say nothing. You already know what time it is. And then he also said he'd do cross game." Johnson understood defendant's comment about the time as a threat against himself and his family, and "cross game" was a reference to Phason.

An autopsy established that Phason died from a shotgun wound to the top of his head fired from a distance of inches to several feet away. Photographs were taken of tattoos on Phason's body and later shown to the jury.

Johnson did not tell the police about the shooting because he was scared, and he avoided defendant because he did not want to be involved. Johnson heard that defendant belonged to the Nutcase gang, and that contributed to both his fear and his reluctance to go to the police. He was aware of the gang's general reputation and "all the wrong" it did.

In December 2004, Johnson was questioned by police about Phason's murder. He was still afraid and reluctant to talk, but told the officers what he knew about the shooting.

L.E. was at the Halliday Street house two days before Phason's murder, and testified about what happened when she was there. L.E. lived in the same apartment complex as Phason in Richmond. On the night of June 5, 2004, L.E. went to meet Phason in Oakland to bring him some clothes he had left in her apartment. She followed Phason's directions to the Halliday Street house, and arrived sometime around 11:30 p.m. Defendant and others were there. L.E. had never met defendant before.

L.E. and Phason left the house in L.E.'s car to buy a bottle of Hennessey, and on the way Phason bought a bag of marijuana. After they returned to the house Phason tried to get L.E. to drink some of the Hennessey, but she refused. She sat on the porch with Phason for about half an hour until other people left, and then went inside the house. Defendant was guarding the front door with a shotgun. L.E. started to leave, but Phason told her to wait because he wanted to go with her. She and Phason went into a back room with defendant and another woman. L.E. smoked about four hits of marijuana. Some in the group were drinking alcohol, but not L.E.

At some point Phason left the house, took L.E.'s car and did not return until the next morning. L.E. testified that she spent the night at the house even though she did not know any of the people and did not want to stay there.[1] Early the next morning she and defendant sat on the front porch for about 10 minutes. Defendant was holding and "playing with" a small black gun. L.E. wanted to leave. She testified defendant was "stating pretty much about what happened, 'did something happen?' and I was just like, what happened?" L.E. understood that defendant was asking whether she would tell anyone what had happened during the night, and she responded "what happened?" to indicate to him that she would not say anything. She thought defendant was trying to frighten her. She testified that she was a "little bit" afraid because she was there against her will and her car was gone, but mostly she was "traumatized, like the whole situation just completely what happened, I was ready to go." She could not remember if defendant mentioned the Nutcase gang.

Even though she was barefoot, L.E. started to walk to a nearby gas station. Defendant followed her, told her to come back, and said he would tell Phason to return with her car. L.E. complied because she did not know anyone in the area and had

[1] L.E. did not describe what occurred at the house during the night. The court had ruled in limine that L.E. could not testify about her claim that defendant raped her. We will discuss this ruling in greater detail in our discussion of defendant's argument that the court erred when it withdrew the restriction on her testimony and allowed L.E. to testify about the rape.

nowhere else to go. Defendant called Phason, who drove up in L.E.'s car a few minutes later, and L.E. drove home to Richmond.

During cross-examination, L.E. testified that she tried to leave the house shortly after she realized that Phason had gone but she "couldn't get out the front door. I was trying to leave. I didn't make it to the front door." She also testified that she never slept during the night.

Defense counsel asked L.E. whether defendant had ever threatened her. She replied: "Well, my point of view a person doesn't necessarily have to say that they gonna, you know, they gonna do something to you. But from a conversation, I would say the conversation that words that exchanged on—the words that was—my response was always, I don't know what you talking about, or I don't know what happened." Defense counsel then asked whether defendant said he would harm L.E. or that some harm would come to her. L.E. answered: "He brought up am I going to tell someone, or if I'm going to tell, something like that, in that type of case, so what happened, am I going to tell someone? And I was just what happened? Basically, like what I going to tell what happened? You tell me what happened. What happened?"

When L.E. finished her answer, the prosecutor asked for an in-chambers conference. After conferring with counsel, the court lifted its previous restrictions on L.E.'s testimony. In her redirect examination, L.E. testified that she tried to leave the house after Phason did, but defendant stopped her by grabbing her hair and pulling her back. She struggled, but defendant was too strong. When L.E. asked defendant what he was doing, he called her a "bitch" and told her to "shut the fuck up." Defendant forced L.E. into a bedroom. She struggled some more and tried to leave the room, but the door was locked from the inside. Defendant restrained L.E.'s hands, pulled her pants down and performed oral sex and intercourse on her.

The prosecutor asked L.E. whether defendant mentioned the Nutcase gang while he was raping her. She replied: "He just mentioned that I know what this is . . . . He just like you know what this is. I was like get off me. Leave me the fuck alone. Get Glen. Get Glen. Let Glen back in here." When asked again if defendant mentioned the gang,

L.E. said "I want to say, yeah. He just says—he said something to me about I know what this." She could not remember if he used the words Nutcase or something similar. Early the next morning defendant let L.E. leave the room and they went to the front porch.

The prosecutor asked L.E. if she knew whether Phason was a member of the Nutcase gang. The court allowed her to answer over a defense objection, and instructed the jury that her answer could only be considered to show L.E.'s state of mind "so that you can evaluate, among other things, evaluate her credibility as a witness here." L.E. testified that Phason said he belonged to the Nutcase gang, and that she had seen his gang tattoo.

L.E. said she was concerned for her safety when she reported the rape to the police because she knew defendant "was a[]part of something." She believed Phason was also involved in her assault because he took her car and left her with defendant.

The prosecutor played a portion of L.E.'s taped interview with an Oakland police homicide sergeant in January 2005. The sergeant asked whether defendant told her he was "one of the Nut Cases." L.E. replied: "I heard him say that." She described a conversation on the porch between defendant and Phason: "[Defendant] was just talking to them like about then you know remember what happened just talking little stuff and then (unintelligible) I'm not slow like they wasn't just really just saying it like out loud (unintelligible) and he was like (unintelligible) you know how we do and stuff like that. They just talking amongst each other. I didn't even know the boy's name."

The interview continued: "Q: He didn't say to you, hey, I'm a Nut Case? You just listened to him and Glen talk to each other? [¶] A. When it was them but when we got in that room when it was just me and him when he was raping me and shit he was talking about his gang shit. [¶] Q: What was he saying? [¶] A: While he was yelling at me while he was raping me and stuff. Bitch shut up, what is it, he wasn't just saying, he didn't call it the Nut Case, he didn't call it that. He called it something Crazy Lunatics or Crazy something. [¶] Q: Looney Tunes? [¶] A: Something, something whatever he called it something with Crazy Insane, Crazy something, Insane or whatever, something he was saying, they, I knew they was all a part of it because Glen had a tattoo, Lou had a

tattoo 'cause Lou had his shirt off. [¶] Q: What was it? [¶] A: And I was just like what is this or whatever. [¶] Q: What was the tattoo? A: What was it, what was it, what was it. I don't even remember."

The prosecutor asked L.E. whether hearing the taped interview refreshed her recollection as to whether defendant mentioned the Nutcase gang. L.E. replied: "Like I said, I can't remember him saying Nutcase exactly like that." On recross examination, L.E. said she "didn't hear him say [Nutcase] never."

When Phason's body was discovered, police found an open bottle of Hennessey cognac in his sweatshirt pocket. DNA from three different people was recovered from the bottle neck. Phason and defendant could not be eliminated as two of the contributors. The likelihood of defendant's genetic profile occurring would be one in 615 billion members of the Caucasian, African-American, and Southeast Hispanic populations.

Defense Case

Tanika Barber had been defendant's "on and off" girlfriend since 1999 or 2000. She testified that she visited him at his grandmother's house sometime between Friday, June 4, 2004, and Sunday, June 6, 2004. She could not have been there on Monday, June 7, the day of Phason's murder, because Barber worked in Pleasanton during the week.

On the night she visited, Barber was there from approximately 9:00 p.m. to 2:30 a.m. and she worked on defendant's dreadlocks. Defendant never left the house that evening because he was afraid someone was going to kill him. Barber did not see a gun in the house. She never heard defendant mention the Nutcase gang and did not know if he belonged to it.

Deborah Colbert is defendant's aunt. Colbert testified that she lived in the Halliday Street home with defendant and her mother, who was defendant's grandmother. Defendant had lived there since he was released from jail in May 2004. He never left the house because he was paranoid and said people, including the police, were after him and were trying to kill him.

Colbert testified that on Monday, June 7, 2004, Barber was at the Halliday Street house working on defendant's hair from about 8:00 or 9:00 p.m. until 2:00 or 3:00 a.m.

Colbert never saw a gun in the house and had never seen defendant with a gun. She did not see Larry Johnson at the house that day and did not see or hear anyone sitting on the porch. Colbert first saw Phason visit the house in June 2004. She had seen L.E. at the house three times, including the night of June 5th, when L.E. and Phason left together around 1:00 or 2:00 a.m.

Colbert said she did not know what the Nutcases are. She knew that defendant has a tattoo of a peanut on his arm, and said it was for his deceased friend Will. It said "Will, still not listening or something like that." When she was shown a photograph, she identified it as depicting defendant's tattoo and acknowledged that it said "Nut Case." Colbert also testified that defendant did not drink alcohol, smoke, or get high. She did not contact the police to tell them defendant had been at her home on June 7, 2004, after she learned he had been charged with Phason's murder.

Defendant was convicted of first degree murder with various firearm enhancements and possession of a firearm by a felon. The jury also found true a prior offense that qualified as a "strike" under the three strikes law. The court imposed a total term of 75 years to life in prison, composed of 25 years to life for the murder, doubled pursuant to the three strikes law, and a consecutive 25-year term for one of the firearm use enhancements. Pursuant to Penal Code section 654, the court stayed execution of sentence on the other firearm use allegations and stayed imposition of a 16-month term for possession of a firearm by a felon. This appeal followed.

DISCUSSION

I. *Denial of Right of Self-Representation*

Defendant contends the trial court violated his Sixth Amendment right to a defense when it denied his request that he be allowed to represent himself. We conclude the court did not err when it ruled that defendant's request was equivocal and reappointed his attorney.

A. Relevant Facts

Defendant filed a series of unsuccessful pretrial motions pursuant to *People v. Marsden* (1970) 2 Cal.3d 118 to discharge his appointed counsel. After the court denied

his third *Marsden* motion, defendant filed a motion pursuant to *Faretta v. California* (1975) 422 U.S. 806, seeking permission to represent himself. On April 25, 2006, the trial court, the Honorable Philip Sarkisian presiding, granted defendant's motion.

On May 3, 2006, at defendant's request, his recently discharged defense attorney filed a motion to advance a hearing in defendant's case. The motion was denied. On May 17, 2006, defendant's case was called for a hearing before the Honorable Allan Hymer. The court noted that it had received defendant's letter dated May 5, 2006, that stated: "Your Honor, I know I need an attorney for this homicide case, and I need all the good help I can get." Defendant confirmed that he had written the letter. He told the court: "I wrote the letter to Judge Clay and I asked him because me and Mr. Berry [defendant's prior counsel] don't see eye to eye. If we [are] having problems, meaning he's not filing none of my motions, right, and I asked—[.]" The court asked defendant whether he was moving to revoke his *Faretta* status and have counsel appointed. Defendant responded: "That's if, um, if they, um, can assign me another attorney besides Mr. Berry." The court responded: "Well, I'm going to find based on this record that your request for *Faretta* status is equivocal, and, therefore, that you should not be representing yourself. Therefore, I will reappoint Mr. Berry to represent you." Defendant protested: "No. See, when I wrote that letter to Don Clay, I wrote that letter as far as my motions being filed. And I asked him, right, that if I could have another attorney. [¶] I'm not—I'll stay pro per, because Mr. Berry, I'm not representing—I don't want him representing me." The court noted that it was "for that reason" that it was finding his *Faretta* request was "equivocal." "In other words, you don't really want to represent yourself. You just want a different attorney than Mr. Berry." Defendant replied: "No, I do want to represent myself, and that ain't all I wrote in that letter. You just—[.]" The court responded: "Based on the record, I don't believe you. So I'm finding that the motion to represent yourself is equivocal and Mr. Berry is reappointed."

Defendant then said he wanted to move to dismiss Mr. Berry as his counsel. The court denied the motion on the ground that there was no showing of changed

circumstances since defendant's previous *Marsden* motions were denied and "[b]ecause I find that those motions are dilatory . . . and are only intended to delay the proceedings."

B. Analysis

Faretta holds that the Sixth Amendment grants an accused the right to present his defense personally upon a timely and unequivocal request to do so. (*People v. Dunkle* (2005) 36 Cal.4th 861, 908-909, disapproved on another point in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) In *People v. Marshall* (1997) 15 Cal.4th 1, 20, our Supreme Court explained that the requirement for an unequivocal request resolves the tension between the rights to the assistance of counsel and to self-representation. "Many courts have explained that a rule requiring the defendant's request for self-representation to be unequivocal is necessary in order to protect the courts against clever defendants who attempt to build reversible error into the record by making an equivocal request for self-representation. Without a requirement that a request for self-representation be unequivocal, such a request could, whether granted or denied, provide a ground for reversal on appeal. . . . It is not only the stability of judgments that is at stake, however, when we require a defendant to make an unequivocal request for self-representation. The defendant's constitutional right to the effective assistance of counsel is also at stake—a right that secures the protection of many other constitutional rights as well. . . . The court faced with a motion for self-representation should evaluate not only whether the defendant has stated the motion clearly, but also the defendant's conduct and other words. Because the court should draw every reasonable inference against waiver of the right to counsel, the defendant's conduct or words reflecting ambivalence about self-representation may support the court's decision to deny the defendant's motion." (*Id*. at pp. 22-23.)

Even *after* an initial unequivocal request, a defendant may waive the right to self-representation. In *McKaskle v. Wiggins* (1984) 465 U.S. 168, 182, the United States Supreme Court held that "[a] defendant's invitation to counsel to participate in the trial obliterates any claim that the participation in question deprived the defendant of control over his own defense. Such participation also diminishes any general claim that counsel

unreasonably interfered with the defendant's right to appear in the status of one defending himself." (*Ibid.*) Similarly, *Brown v. Wainwright* (5th Cir. 1982) 665 F.2d 607 holds that a waiver may be found after a defendant has asserted the right of self-representation if it reasonably appears from his conduct that he abandoned his request. (*Id*. at p. 611.) "Even if defendant requests to represent himself . . . the right may be waived through defendant's subsequent conduct indicating he is vacillating on the issue or has abandoned his request altogether. . . . [¶] . . . [s]ince the right of self-representation is waived more easily than the right to counsel at the outset, *before* assertion, it is reasonable to conclude it is more easily waived at a later point, *after* assertion. Therefore, the cases cited by defendant which establish stringent requirements for waiver of counsel [citations], do not apply in full force to the right of self-representation. A waiver may be found if it reasonably appears to the court that defendant has abandoned his initial request to represent himself." (*Ibid.*; see also *People v. Kenner* (1990) 223 Cal.App.3d 56, 60-62.)

The foregoing authorities generally describe the tension between the right to counsel and the mutually exclusive right to self-representation. (*People v. Marshall*, *supra*, 15 Cal.4th at p. 20.) Waiver of the right to counsel is subject to strict analysis and every inference is drawn against a defendant's waiver. (*Id*. at pp. 22-23.) The requirement that a waiver be unequivocal is designed to ensure that defendants have the full opportunity for assistance of counsel and do not abuse the right to self-representation by using their waiver to build reversible error into the record. (*Ibid*.) In Merriam-Webster's Eleventh Collegiate Dictionary (2007) at page 1366, the commonly accepted definition of unequivocal is: "leaving no doubt." Whether a defendant has made a knowing and voluntary waiver of the right to counsel, or knowingly and voluntarily asserted the right to self-representation, presents two sides of the same coin. Each turns on defendant's unequivocal determination to represent himself.

Although the standard of review we are to employ to determine whether a defendant has made an unequivocal waiver of the right to counsel or abandoned the right to self-representation has been characterized as unsettled (*People v. Marshall*, *supra*, 15

Cal.4th at p. 25), our review of the foregoing authorities reveals that the appellate courts take a familiar approach to the question. In light of the importance of legal assistance to an accused and the potential manipulation that can arise from the assertion of the right to self-representation, the appropriate standard is the same as that customarily employed to determine whether a defendant has made a knowing and voluntary waiver of constitutional trial rights. In order to demonstrate that a defendant's waiver of his right to counsel and assertion of self-representation is unequivocal, it must be affirmatively shown to be so on the record. (See *People v. Howard* (1992) 1 Cal.4th 1132, 1175.) In the event the record permits argument about the unequivocal nature of a defendant's desire to self-represent, appellate courts have not hesitated to conclude the right to self-representation was waived. (*McKaskle v. Wiggins, supra*, 465 U.S. at p. 182; *Brown v. Wainright, supra,* 665 F.2d at p. 611; *People v. Kenner*, supra, 223 Cal.App.3d at pp. 60-62.) Accordingly, when the record shows a defendant vacillates in his assertion of the right to self-representation or the trial court has a basis to conclude that his choice is insincere or made for an improper purpose, we will not disturb the trial court's insistence that the defendant be represented by counsel.

Defendant invoked his *Faretta* right only after his motions to replace Mr. Berry as his counsel were denied. Yet, just over a week following Mr. Berry's removal, defendant asked Mr. Berry to file a motion to advance his next court date. Two days after that, defendant wrote to the court to request appointment of a new attorney, and said, "I know I need an attorney for this homicide case, and I need all the good help I can get." When Judge Hymer questioned defendant about his request, defendant explained it was because he did not "see eye to eye" with Mr. Berry and that Mr. Berry was not doing what defendant wanted. When the court asked whether defendant was moving to revoke his *Faretta* status, defendant responded that he was—*if* he could have someone other than Mr. Berry. On this record, the court could reasonably conclude that defendant's objective was to secure counsel other than Mr. Berry, and that his *Faretta* invocation was insincere. Our careful review of the record leads us to conclude that defendant abandoned his invocation of his *Faretta* rights when he continued to make use of his former attorney's

services and asked for appointment of a new attorney after the court granted his *Faretta* motion. Our conclusion is reinforced by the requirement that we draw every inference against a waiver of the right to counsel, i.e., against concluding that a defendant wishes to represent himself. (See *People v. Marshall*, *supra*, 15 Cal.4th at p. 23.)

Defendant relies on authority that a *Faretta* request is not rendered fatally equivocal if the defendant conditions it on the denial of his request for new counsel. "There is nothing equivocal in a request that counsel be removed and, if not removed, that the defendant wants to represent himself. Once the court has decided not to remove counsel, the defendant has the choice of going ahead with existing counsel or representing himself. There is nothing improper in putting the defendant to this choice, so long as the court did not err in refusing to remove counsel." (*People v. Michaels* (2002) 28 Cal.4th 486, 524; accord, *Adams v. Carroll* (9th Cir. 1989) 875 F.2d 1441.) This is an accurate statement of law, but it is inapplicable here.

Defendant sought appointment of a lawyer other than Mr. Berry. When he did not succeed, he sought and received permission to represent himself. The problem for defendant is that his actions draw his professed desire into question. He asked Mr. Berry to perform services following his removal, and he wrote a letter to the court seeking appointment of a new lawyer. This record does not compel a conclusion that defendant undoubtedly desired to represent himself if he could not get a lawyer other than Mr. Berry. The record shows no such clear and unequivocal choice. We will not disturb the trial court's ruling.

II. *Admission of Gang Membership Evidence*

Defendant next contends the trial court's admission of evidence of defendant's affiliation with the Nutcase gang was prejudicial error. We disagree.

A. Relevant Facts

In pretrial motions in limine, the court considered the admissibility of threats defendant allegedly made to L.E. and Larry Johnson to dissuade them from going to the police with information about the rape and Phason's murder. Defendant's threat to L.E. included an acknowledgement that defendant belonged to the Nutcase gang. Defendant

objected to the introduction of any evidence of his possible gang affiliation because there was no evidence that Phason's murder was gang related. He also argued the gang evidence was irrelevant because there was no evidence of motive for Phason's killing, and the potential probative value of the gang evidence was outweighed by the prejudice to defendant if he were identified as a member of the Nutcase gang.

The prosecutor responded that both defendant and Phason had tattoos indicating their membership in the Nutcase gang and that defendant told two other individuals, Aevra Traylor and Antonio Roberson, that he killed Phason because Phason was bragging about robbing local drug dealers with defendant; because Phason had disobeyed defendant's order to kill someone; and because defendant felt Phason was going to kill him and another gang member, "Little Lou." The prosecutor acknowledged that defendant did not directly say these motives were related to the Nutcase gang, but argued they were all predicated on the Nutcase gang affiliation that he shared with Phason. The prosecutor also argued that defendant's gang membership was relevant to the credibility of witnesses L.E. and Johnson, because their knowledge that defendant was a gang member was one of the reasons they took his threats seriously and were reluctant to testify.

The court ruled that defendant's threats against L.E. were not relevant to the murder case. But the judge told counsel his ruling "could change both during the course of the People's case-in-chief and definitely could change with respect to rebuttal testimony. Because if Ms. [E.] testifies and she is cross-examined as to the circumstances in which she is present there and made the observations that she purportedly makes about [defendant] in possession of a shotgun [, it] could very well be that we would need another out-of-the-presence-of-the-jury hearing that would open the door that I previously closed with respect to the relevance of the context of . . . of Ms. [E.]'s presence and [defendant's] statements."

The following day, after further research, the court addressed defendant's alleged threats against Johnson, Traylor and Roberson, and ruled they were admissible because they were relevant to the witnesses' credibility and defendant's possible consciousness of

guilt. The court explained: "So the question is this: should this court . . . allow the various witnesses to explain the basis for their fears regarding the defendant's threats, the facts which would allow the jury to evaluate the witnesses' fears? I think so. . . . [¶] . . . [T]he jury needs to know the basis for witness's fear, the facts which will allow the jury to evaluate the witness's fear and thus make a meaningful assessment of witness's credibility. [¶] Therefore, my ruling is that witnesses who testify of having received threats from the defendant to kill the witness, to kill members of his or her family may testify with the basis of their fear and to the facts which would allow the jury to assess and evaluate the fear and thus to assess and evaluate the witness's credibility. If these bas[es] and these facts include the witness's belief that the defendant was or is a member of the Nutcase gang, the witness may so testify."

In light of this ruling, the court revisited its preliminary ruling regarding L.E.'s testimony. L.E. was allowed to testify that defendant threatened to kill her if she went to the police and to describe the context of the threats, including that he was loading a shotgun at the time and told her he was a member of the Nutcase gang. However, she would not be allowed to mention that defendant raped her.

In his opening statement, the prosecutor said that defendant and Phason were connected by their gang affiliation. He also said that L.E. spent the night at the Halliday Street house, although she did not want to; that she saw defendant look out the front door while holding a shotgun several times that night; and that in the morning, defendant threatened her not to call the police. The prosecutor said that given the passage of time, L.E. was no longer clear "what else accompanied the threat. But it was some reference to either 'Nutcase' or 'crazy' or some type of organization, a gang in which he threatened her with." The threat carried weight with L.E., the prosecutor said, because she had seen Phason and other members of the Nutcase gang at her apartment complex in Richmond. At trial, both L.E. and Johnson testified as described in our Background section, *ante*, pertaining to defendant's affiliation with the Nutcase gang. Neither Traylor nor Roberson testified.

B. Analysis

Defendant contends the evidence of his membership in the Nutcase gang should have been excluded because it was irrelevant and, even if relevant, was more prejudicial than probative. Thus, we review the trial court's admission of the evidence for abuse of discretion. (*People v. Brown* (2003) 31 Cal.4th 518, 547; *People v. Albarran* (2007) 149 Cal.App.4th 214, 224-225.) We find none here.

The trial court correctly found the gang evidence was relevant because it bore upon the credibility of L.E. and Johnson. Both of them testified that defendant threatened them and warned them not to talk to the police. Each said they were afraid to talk to the police based on defendant's threats. " ' "Evidence a witness is afraid to testify is relevant to the credibility of that witness and is therefore admissible. [Citations.] Testimony a witness is fearful of retaliation similarly relates to that witness's credibility and is also admissible." ' " (*People v. Sanchez* (1997) 58 Cal.App.4th 1435, 1449-1450.) Moreover, "[a] witness who testifies despite fear of recrimination of any kind by anyone is more credible because of his or her personal stake in the testimony." (*People v. Olguin* (1994) 31 Cal.App.4th 1355, 1368, italics omitted.)

Johnson witnessed the murder but did not voluntarily come forward to the police. He only disclosed what he saw reluctantly when he was questioned by officers six months after the killing. His knowledge of defendant's gang affiliation was relevant to explain his reluctance, and was important evidence for the jury to consider in assessing his credibility. Moreover, evidence of defendant's gang membership suggested a possible motive for the killing in a case where motive was particularly murky. As the prosecutor argued to the jury, "Presence of motive may tend to show the defendant is guilty. Absence of motive may tend to show the defendant is not guilty. [¶] I already talked to you about the Nutcase gang motive. You don't need a motive when you're in the Nutcase gang. You crossed the Nutcase gang and you cross Greg, it's part of the 'G' Code. You die."

We are also unpersuaded by defendant's assertion that the gang evidence was unduly prejudicial and should have been excluded under Evidence Code section 352.

Because of its potentially inflammatory impact, our Supreme Court has condemned the introduction of evidence of gang membership if it is only "tangentially relevant" to the issues at trial. (*People v. Cox* (1991) 53 Cal.3d 618, 660.) It is inadmissible if its sole relevance is to show criminal disposition or bad character as a means of creating an inference the defendant committed the charged offense. (*People v. Avitia* (2005) 127 Cal.App.4th 185, 192.) Here, however, the evidence of defendant's gang membership had significant bearing on the credibility of critical witnesses, including the sole eyewitness to the shooting. The court did not abuse its discretion in determining that its potential for undue inflammatory impact did not outweigh its probative value. (*People v. Albarran*, *supra*, 149 Cal.App.4th at pp. 224-225.)

III. *Admission of Evidence About Defendant's Rape of L.E.*

Defendant next asserts the court committed reversible error when it permitted L.E. to testify that defendant had raped her. This assertion is also unpersuasive.

A. Relevant Facts

As discussed in our Background section, *ante*, the court initially ruled that L.E. could not testify that she was raped by defendant, but revisited its ruling after defense counsel cross-examined L.E. about defendant's threats. The prosecutor argued that defense counsel placed L.E. "in a very awkward situation, to say the least," when he asked her questions "such as: did you ever hear him say that he was part of an organization; did he ever say he was going to harm you or that harm was going to come to you? He asked her about going to yet another room in the house, which I did not touch upon in my direct examination, and that is the room where the rape occurred. [¶] He also asked her about going to the front door, and the witness testified rather ambiguously that she tried to make it to the front door but did not make it to the front door. I have instructed the witness and if the court inquires of it she will so affirm not to discuss[] any circumstances related to this rape unless she was so instructed by the court. And I think she has done her best both on cross and direct examination to stay away from that. And I think she's to be commended for that. [¶] But I think now in light of his questioning, the jury is left with a void and perhaps a misleading perception of Ms. [E.] given the

ambiguous nature of her testimony, and I think the jury should be entitled to now hear the substance of that so that can be put in context not only to evaluate her credibility but to evaluate her demeanor, to also put into context now in light of all questioning and her responses the context of the threats that were made to her . . . ."

Defense counsel pointed out that his questions were intended to clarify the context, but not the reason for defendant's threats. Counsel was seeking to explore whether defendant threatened L.E. directly or only by implication.

The court lifted its initial restriction on L.E.'s testimony and said: [I]t's quite clear this court made a very specific ruling on the issues, the in limine issues. The court ruled for the reasons placed on the record at the in limine hearing. . . . [¶] . . . [a]nd it's my impression that this witness has done the very best she can to fully and in good faith comply with that order. [¶] Now, though, on cross-examination, she is asked questions which can really only be answered, questions by you, on cross-examination that can only be answered by making reference to the conduct that I had previously informed her she could not say. That puts her in an impossible position. So I'm going to lift that ruling . . . and what this means[,] Ms. [E.], . . . you are no longer under the court's order that you may not make any mention of what occurred during the time you . . . arrived at that house and the time you attempted to leave the next morning." The court subsequently reaffirmed its ruling when it denied defendant's motion for a new trial.

B. Analysis

Defendant argues his due process rights were violated because the prosecutor and court put him in "an untenable, 'Catch-22 position' " when L.E. was allowed to testify about defendant's threats. He contends that after the prosecution elicited L.E.'s testimony that she was traumatized the morning after spending the night at the Halliday Street house, defense counsel was forced to either "forego[] any cross-examination on the subject of why [E.] was 'traumatized' which would have denied [defendant] his Sixth Amendment right to confrontation of the witnesses against him, or he had to exercise his constitutional right to cross-examine [E.]s and risk that she would 'open the door' to an inquiry" about the rape. We disagree.

There was nothing improper about the prosecutor questioning L.E. about defendant's threats, and there is no indication in the record that his questioning was a deliberate attempt to trick defense counsel into "open[ing] the door" to testimony about the rape, as defendant implies. Defense counsel was aware that the court could possibly lift the prohibition against Evan's testimony about the rape as the trial progressed, but made a tactical decision to try to elicit testimony from L.E. that she was never expressly threatened by defendant. While it was foreseeable the court might revisit its earlier ruling that excluded the rape based upon the state of the evidence, it certainly was not a foregone conclusion.

We also reject defendant's allegation that his counsel was ineffective because he "open[ed] the door" to the rape testimony. " 'Reviewing courts will reverse convictions on the ground of inadequate counsel only if the record on appeal affirmatively discloses that counsel had no rational tactical purpose for his act or omission,' " and we must affirm if the record sheds no light on why counsel acted or failed to act in the challenged manner unless counsel was asked and failed to provide a reason or "there simply could be no satisfactory explanation." (*People v. Zapien* (1993) 4 Cal.4th 929, 980; *People v. Pope* (1979) 23 Cal.3d 412, 425-426.) Here, defendant's attorney could reasonably have concluded that establishing that defendant did not threaten L.E. with physical harm would

undermine her testimony and credibility, and in this light was worth the risk that his questions might result in the court admitting her claim of rape.

Defendant argues that the prosecutor had a duty to object to defense counsel's questioning if he thought the questions would require L.E. to testify about the rape, and therefore the People "cannot take advantage of defense counsel's cross-examination to elicit testimony on redirect that was not only immaterial and irrelevant to the homicide . . . but was also prejudicial to [defendant] in the extreme." Defendant relies on the rule that "by allowing objectionable evidence to go in without objection, the non-objecting party gains no right to the admission of related or additional otherwise inadmissible testimony. The so-called 'open the door' or 'open the gates' argument is 'a popular fallacy.' " (*People v. Gambos* (1970) 5 Cal.App.3d 187, 192; *People v. Williams* (1989) 213 Cal.App.3d 1186, 1189-1190, fn. 1.) But there was nothing objectionable about defense counsel's questions or L.E.'s answers. Rather, both lawyers and the witness diligently complied with the court's prior order and avoided mentioning the rape. As a result, L.E.'s testimony appeared confused and unbelievable. Although she testified that defendant had threatened her, Evan's testimony disclosed no reason that he would do so. The trial court reasonably reconsidered its original ruling, as it had anticipated might become necessary. The consequence was not the introduction of inadmissible testimony, as in the cases cited by defendant, but instead was the result of the court's appropriate reweighing of factors governing admissibility in Evidence Code section 352.

We are also satisfied that the court's determination after reweighing the excluded evidence was within the scope of its broad discretion. The test under Evidence Code section 352 is not whether evidence is prejudicial, but whether it is *unduly* prejudicial. "['E]vidence should be excluded as unduly prejudicial when it is of such nature as to inflame the emotions of the jury, motivating them to use the information, not to logically evaluate the point upon which it is relevant, but to reward or punish one side because of the jurors' emotional reaction. In such a circumstance, the evidence is unduly prejudicial because of the substantial likelihood the jury will use it for an illegitimate purpose." (*Vorse v. Sarasy* (1997) 53 Cal.App.4th 998, 1009.) It is true that testimony about the

rape was likely to elicit an emotional reaction. That is no doubt why the trial court initially precluded its introduction. But by the time the court reconsidered its ruling, it had become clear that the testimony was highly relevant to the context and credibility of Evan's testimony. The trial focused on the murder, not the claim of rape, and there was substantial evidence—including eyewitness testimony—that defendant killed Phason. The court reasonably concluded the probative value of the evidence was not outweighed by its potential for causing undue prejudice.

IV. *Sufficiency of the Evidence*

Defendant contends there is insufficient evidence of premeditation and deliberation to support the first degree murder verdict. To evaluate this claim, "we must 'examine the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value that would support a rational trier of fact in finding [the defendant guilty] beyond a reasonable doubt.' [Citations.] Three categories of evidence are helpful to sustain a finding of premeditation and deliberation in a murder case: (1) planning activity; (2) motive; and (3) manner of killing. [Citations.] Evidence of each of [these] factors need not be present in order to support a finding of deliberation, but planning, or motive in conjunction either with planning or with manner of killing, must be present to support such a finding. [Citations.] A judgment will not be reversed so long as there is substantial evidence to support a rational trier of fact's conclusion that the murder committed was premeditated and deliberate." (*People v. San Nicolas* (2004) 34 Cal.4th 614, 657.)

Substantial evidence supports the first degree murder conviction here. There was ample evidence of planning. L.E. saw defendant at his grandmother's house with a shotgun two days before the murder. On the day of the murder, Johnson was about to drive Phason home when defendant came down from his porch and announced he was going with them. After he and Phason got out of the car, defendant shot Phason with a shotgun, and retrieved the spent shells from the sidewalk. Johnson did not see the gun before the shooting, but afterward he saw defendant tuck it under his coat. This evidence

of preparation and concealment adequately shows that defendant planned the murder before he left his house.

Although not as strong as the evidence of planning, there was also evidence of motive. Both Phason and defendant belonged to the same criminal street gang, and defendant commented to Johnson that Phason "said he'd do cross game"—possibly meaning that Phason was planning to cross him. Substantial evidence supports the conviction.

In light of our rejection of each of defendant's claims of error, his claim of cumulative error is also rejected.

DISPOSITION

The judgment is affirmed.

_____
Siggins, J.

We concur:

_____
Pollak, Acting P.J.

_____
Jenkins, J.